

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992)	CS Docket No. 01-290
)	
)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act)	
)	
)	
Sunset of Exclusive Contract Prohibition)	
 To: The Commission		

**COMMENTS OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

Pursuant to Section 1.430 of the Rules and Regulations of the Federal Communications Commission (Commission), the National Rural Telecommunications Cooperative (NRTC), by its attorneys, submits these Comments in response to the Notice of Proposed Rulemaking issued on October 18, 2001.¹ Among other things, the Commission's Program Access rules generally prohibit exclusive contracts between cable operators and vertically integrated programming vendors in areas served by cable.² This particular provision of the Program Access rules will expire on October 5, 2002, unless the Commission finds that its continuation is "necessary to

¹ Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290, FCC 01-307 (Released October 18, 2001).

² 47 U.S.C.A. §548(b), See, 47 C.F.R. § 76.1002. The restriction on exclusive contracts in areas served by cable is not without exception. The Commission has the discretion to approve such contracts if they are in the public interest. In determining whether the exclusive arrangement is in the public interest, the Commission is to consider the effect the contract will have on competition in local and national program distribution markets; the effect the contract will have on non-cable program distributors; the effect the contract will have in attracting capital investment for new satellite cable programming; the effect of the contract on diversity of programming; and the duration of the contract (See, 47 C.F.R. §76.1002(c)(4)). This provision allows the Commission to protect competition and diversity of programming by monitoring the likely effects of exclusive arrangements.

preserve and protect competition and diversity in the distribution of video programming.”³

Given the current position of the cable industry in the multichannel video program distribution (MVPD) market, it is imperative that the rule be extended beyond its tentative sunset date.

I. BACKGROUND.

1. NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located throughout 46 states. Since its founding in 1986, NRTC’s mission has been to provide much needed advanced telecommunications technologies and services to rural America.

2. In 1994, NRTC assisted in capitalizing the launch of the DIRECTV Direct Broadcast Satellite (DBS) satellite business. Through a DBS Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV’s predecessor-in-interest), NRTC received program distribution and other rights to market DIRECTV programming services to rural America. NRTC, its members and affiliates currently distribute DIRECTV programming to more than 1,800,000 rural households using DBS technology.⁴

3. In providing MVPD services to those parts of rural America that have access to cable services, NRTC competes against a cable company (either digital, or, more likely, analog) and EchoStar, the only high-powered DBS licensee other than DIRECTV that is capable of serving the entire continental United States (CONUS).⁵ In the large parts of rural America not served by

³ 47 U.S.C. §548(c)(5); See Also, 47 C.F.R. §76.1002(c)(6).

⁴ NRTC also distributes C-band satellite programming through its members to some 25,000 subscribers.

⁵ Many of the rural cable systems are analog and offer far fewer channels, poorer picture quality, fewer or no pay-per-view movies, significantly higher per channel cost, and an inability to use new technologies, such as interactive television, than digital cable systems.

cable, DIRECTV/NRTC and EchoStar compete as the only two MVPDs offering comparable packages of multichannel video programming services to consumers.⁶

4. Since its inception, one of NRTC's principal goals has been to ensure that rural Americans receive the same access to programming that is available to consumers in more populated urban areas. As early as 1989, NRTC supported Commission and Congressional efforts to obtain access to satellite delivered programming on nondiscriminatory terms and conditions.⁷ At that time, NRTC noted that rural home satellite dish (HSD) distributors were required to pay 400% or 500% more than cable operators for the same programming.⁸

5. In 1992, NRTC supported enactment of the Program Access provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act").⁹ During the Commission proceeding to implement the 1992 Cable Act, NRTC continued to emphasize the fact that as a rural satellite programming distributor, it was unfairly required to pay substantially more than cable operators paid for the identical programming.¹⁰ To resolve this and

⁶ C Band, satellite master antenna television (SMATV) systems, multipoint multichannel distribution services (MMDS) and other technologies offer no significant competition to DBS in areas unserved by cable. They are not comparable to digital DBS in quality of service or diversity of programming.

⁷ Notice of Inquiry, *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 4 FCC Rcd 3833 (May 1, 1989).

⁸ Report, *Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 67 RR 2d 675, 5 FCC Rcd 523, ¶58, fn. 82 (December 29, 1989). For some programming services, the disparity was as high as 800% or more.

⁹ 47 U.S.C.A. § 628; See Also, First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 72 RR 2d 649, 8 FCC Rcd 3359 (April 30, 1993) ("Cable Act Report"). As noted by the Commission, the 1992 Cable Act recognized that "potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public." Cable Act Report, at ¶9.

¹⁰ The Commission acknowledged that Congress had found an "imbalance of power, both between cable operators and program vendors, and between incumbent cable operators and their multichannel competitors" in negotiating program distribution agreements. According to the Commission, this imbalance "limited the development of competition and restricted consumer choice." Cable Act Report, at ¶21, 50.

other related problems, the Commission implemented the Program Access rules.¹¹ Congress specifically targeted “persons in rural areas” as intended beneficiaries of the Program Access rules.¹²

6. The growth of the DBS industry to date is in large part a result of the Commission’s successful implementation of the Program Access rules. Particularly in rural America, where DBS is popular and cable is often not available, the Program Access rules have been necessary to preserve and protect competition and diversity in the distribution of video programming.¹³

II. COMMENTS

A. Termination of the Program Access Rules Would Stifle Competition to Cable from DBS.

7. The Program Access rules have been critical to the successful deployment of DBS and remain necessary to foster healthy competition to cable. While DBS has grown as a competitive force, the cable industry has grown as well.¹⁴ Its loss of market share has never exceeded 3% in any given year.¹⁵

¹¹ The rules “have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors.” *Id.*

¹² 47 U.S.C.A. § 548(a); See Also, 135 Cong. Rec. S12152-02 (discussing the benefits of the statute to rural consumers).

¹³ The highest DBS penetration rates –averaging almost 32% – have occurred in states with substantial rural populations (See, Satellite Broadcasting & Communications Association web site <<http://www.sbca.com/mediaguide/factsfigures.htm>> (visited December 3, 2001)).

¹⁴ Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, 2001 FCC LEXIS 98, FCC 01-1, Table C-1 (Released January 8, 2001) (“Seventh Cable Competition Report”) (Between December 1996 and June 97 the cable industry added 650,000 subscribers; between June 1997 and June 1998 the cable industry added 1,250,000 subscribers; between June 1998 and June 1999 the cable industry added 1,290,000 subscribers; and between June 1999 and June 2000 the cable industry added 1,010,000 subscribers).

¹⁵ Seventh Cable Competition Report, Table C-1 (between December 1996 and June 1997, the cable industry’s share of the MVPD market dropped just .64%; between June 1997 and June 1998, its share dropped 1.76%; between June 1998 and June 1999 its share dropped 2.89%; and between June 1999 and June 2000 its share dropped 2.26%).

8. More than one-third of all national programming services are currently vertically integrated with at least one cable Multiple System Operator (MSO).¹⁶ While the cable industry has cited this percentage as a measure of its decreasing influence,¹⁷ the actual number of vertically integrated programming services has almost doubled from 56 in 1994, to 99 in 2000.¹⁸ Of the largest 20 video programming services in terms of subscribership, 9 are vertically integrated with cable MSO's. Despite an initial drop during 1994 and 1995, this number increased shortly thereafter and has remained fairly constant since 1996. Vertically integrated cable programmers control almost half of the programming with the highest number of subscribers, including such critical programming as CNN and CNN Headline News.¹⁹

9. In addition, in 1994, 12 out of 15 programming services with the highest prime time ratings were vertically integrated.²⁰ After a general decline over the next three years, the number has slowly risen to 11 out of 20 such programming services.²¹ Cable MSO's now control more than half of the top 20 prime time rated programming services.

¹⁶ NCTA Press Release, *The Program Access Laws of 1992 are Working: No Further Congressional Action is Needed*, May 2001, obtained from, <http://www.ncta.com/pdf_files/D-Program_access.pdf> (visited December 3, 2001) (stating that vertical integration of cable program networks declined to 35%).

¹⁷ See NCTA Comments at pp. 39-40 (discussing general decrease in vertical integration), submitted in response to, Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (Released June 25, 2001) ("2001 Cable NOI").

¹⁸ First Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, ¶161, fn. 434 (Released September 24, 1994) ("First Cable Competition Report"); See, Seventh Cable Competition Report at ¶173.

¹⁹ In fact, if C-SPAN were included in these numbers – a program touted as being “created by America’s cable companies” (See, <<http://www.c-span.org>>, (visited December 3, 2001)) – the number would represent a full half of all the top 20 programming services. Cable affiliates provide 95% of funding for C-SPAN and C-SPAN2, but have no ownership or program control interests. DBS licensees provide the other 5% of funding and also have no ownership or program control interests (Seventh Cable Competition Report, Table D-6, Notes).

²⁰ First Cable Competition Report, Appendix G, Table 8.

²¹ Seventh Cable Competition Report, at ¶175.

10. The Commission has repeatedly acknowledged the serious difficulties faced by DBS and other MVPDs in obtaining programming from vertically integrated programmers with exclusive agreements with cable operators.²² Continuation of the prohibition against exclusive contracts in areas served by cable is necessary to allow DBS to continue its growth and development as a competitor against cable.

B. Termination of the Program Access Rules Would be Devastating to Rural Americans with Limited Access to Cable.

11. As of June 2000, there were 5.5 million subscribers to digital cable services.²³ While this number is significant, it represents only 5.5% of all TV Households²⁴ – and they are located primarily in lucrative, metropolitan markets.²⁵

12. If exclusive contracts were permitted in areas served by cable, rural consumers who have access to cable may be required to abandon DBS in favor of antiquated analog cable systems in order to receive the MVPD programming of their choice.²⁶ Despite its recent growth,

²² As noted by commenters in the Seventh Cable Competition Report, “vertically integrated cable operators maintain a high degree of market power that enables them to dominate the programming market.” Seventh Cable Competition Report, at ¶¶183 – 189. The Commission acknowledged the concerns of non-cable distributors that a “lack of access to programming, especially sports programming, remains a significant barrier to entry and an impediment to the successful development of a competitive MVPD business.” Id, at ¶181. In its recent *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, the Commission also noted that “large cable operators, because of their size and market share, have overwhelming buying power in the programming market that restricts access to independent programming as well as to vertically integrated programming.” *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, FCC 00-454 (rel. Jan. 2, 2001), at ¶26.

²³ Seventh Cable Competition Report, at ¶ 43.

²⁴ According to the Seventh Cable Competition Report, a TV Household is the number of U.S. homes with at least one television (Seventh Cable Competition Report at ¶18). The Seventh Cable Competition Report listed 100,800,000 TV Households. The NCTA has recently updated its number of digital cable subscribers to reflect 13.7 million customers, which still represents less than 14% of all TV Households.

²⁵ For example, AT&T Broadband has recently stated that it continues to experience strong consumer demand for its broadband offerings, but cites the roll-out of broadband packages only in Atlanta, Boston, Pittsburgh, Portland and San Francisco. Comments of ATT&T Corporation at pp. 25-26, filed in response to 2001 Cable NOI. Similarly, Carolina Broadband, Inc. noted that its offering of broadband services will be available only in “major metropolitan areas.” Comments of Carolina Broadband Inc., p.1, filed in response to 2001 Cable NOI.

²⁶ See, NRTC Reply Comments, filed in response to 2001 Cable NOI, at ¶5.

continued access to vertically integrated programming remains necessary for DBS to offer a variety of programming and to flourish as a competitive force to cable in rural America.

C. The Commission Should Continue to Prohibit All Cable Exclusive Contracts – Not Just Those in Non-Cabled Areas.

13. In the large part of rural America not served by cable, MVPD competition is provided only via satellite by DIRECTV/NRTC and EchoStar.²⁷ Both DIRECTV/NRTC and EchoStar continue to rely on the cable industry to provide much of the most popular programming services.

14. Section 628(c)(2)(C) of the Communications Act prohibits all “practices, understandings, arrangements and activities, including exclusive contracts” that prevent an MVPD from obtaining vertically integrated programming for “distribution to persons in areas *not served* by a cable operator.”²⁸ Section 628(c)(2)(C) is not subject to potential sunset. In the event the Commission allows Section 628(c)(2)(D) to sunset – which prohibits exclusive contracts in areas *served* by a cable operator – the Commission still would be required to enforce the exclusivity prohibition required under Section 628(c)(2)(C) in areas not served by cable.

15. In order to enforce any Program Access rules applicable only to areas not served by cable, the Commission would need to be certain of which specific, local areas have access to cable, and which do not. Not only would the Commission need to establish conclusively which particular areas are served and which are not, but a process would need to be in place to monitor changes in the status of any given area (or particular households within an area).

²⁷ See, n.6.

²⁸ 47 U.S.C. 628(c)(2)(C) (emphasis added).

16. For years the Commission has used the “Homes Passed” numbers provided by the cable industry to reflect the percentage of homes across the country that have access to cable.²⁹ (Homes not passed by cable likely have access to comparable MVPD services only through DIRECTV/NRTC and EchoStar). Recently, the Commission reported that the percentage of Homes Passed by cable is 96.6%.³⁰ Yet, a joint report released in April of 2000 by the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS), entitled *Advanced Telecommunications in Rural America: the Challenge of Bringing Broadband Service to All Americans* (NTIA/RUS Report), found that the actual percentage of Homes Passed could be as low as 81%.³¹ A recent New York Times article also shows that the percentage of homes with access to cable is as low as 78.4%, with more than 25,000,000 homes

²⁹ “Homes Passed” is defined as the total number of households capable of receiving cable television service (See, Seventh Cable Competition Report, fn. 12). “Homes Passed has been generally accepted by the Commission in each of its Cable Competition Reports, as well as in other MVPD related matters. See, First Cable Competition Report, at ¶18 (stating that 96% of homes were passed by cable); Second Cable Competition Report, at ¶7 (stating that 96% of homes were passed by cable); Third Cable Competition Report, at ¶13 (stating that 96.7% of homes were passed by cable); Fourth Cable Competition Report, at ¶14 (stating that 97.1% of homes were passed by cable); Fifth Cable Competition Report, at ¶16 (stating that 96.5% of homes were passed by cable); Sixth Cable Competition Report, at ¶19 (stating that 96.6% of homes were passed by cable); Seventh Cable Competition Report, at ¶18 (stating that 96.6% of homes were passed by cable); And See, Order and Authorization, *MCI Telecommunications Corporation, Assignor and EchoStar 110 Corporation, Assignee*, 15 CR 1038 at ¶16 (May 19, 1999), reiterating 96.6% figure; Order and Authorization, *United States Broadcasting Co. Transferor and DIRECTV Enterprises, Inc. Transferee*, 14 FCC Rcd, 15 CR 645 at ¶14 (April 1, 1999), stating that only 3.4% of U.S. TV households are not passed by a cable system.

³⁰ Seventh Cable Competition Report, at ¶ 18.

³¹ The calculation of cable passage rates can be dramatically impacted by three basic, different sets of statistics: 1) Housing Units; 2) Households; and 3) TV Households. A “Housing Unit” is defined as a house, apartment, mobile home, group of rooms, or single room, that is occupied (or, if vacant, is intended for occupancy) as separate living quarters. A “Household” is a currently occupied “Housing Unit.” A “TV Household” is defined as a home with at least one television. In arriving at its 97% figure, the cable industry may be comparing “apples to oranges,” by counting Housing Units -- not TV Households-- as a percentage of TV Households. The NTIA/RUS Report points out that when a cable provider does not serve a house, it has no easy way to distinguish among a household without a TV, a household with a TV, or an unoccupied housing unit. The cable provider knows only that a Housing Unit is passed. The NTIA/RUS Report concludes, therefore, that a comparison of Homes Passed to Housing Units is especially useful in determining cable passage rates. National Telecommunications and Information Administration and Rural Utilities Service, *Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans*, April, 2000, fn. 62.

unserved. This same article graphically illustrates that many states with large rural populations have a cable passage rate of below 60% or 70%.³²

17. Widespread acceptance of the flawed 97% Homes Passed number has vastly inflated the status of video competition in rural America.³³ It also highlights on a national level the difficulty of enforcing the Commission's Program Access rules based on whether any particular, local area is "served" or "unserved" by cable.

D. The Commission Should Extend the Program Access Rules to Cover any Terrestrially Delivered Programming Previously Delivered via Satellite.

18. On occasion, the cable industry has thwarted the Program Access rules merely by changing its transmission medium from satellite to terrestrial delivery.³⁴ Such action undercuts competition and is contrary to the spirit – if not the letter – of the Program Access rules. Cable operators and vertically integrated programmers should not be permitted to evade the Program Access rules simply by delivering satellite cable programming to subscribers via terrestrial means.³⁵

³² *Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. Times, October 30, 2001, at C-1. The article states that 115.9 million households have access to DBS programming, whereas only 90.9 million households have access to cable services. With a 78.3% passage rate, the number of unserved households equals more than 25,000,000. Sources for the article are cited as: NCTA, the Census Bureau, SkyRESEARCH, Satellite Broadcasting and Communications Association of America, and Kagan World Media.

³³ Comments of NRTC, filed in response to 2001 Cable NOI. Reply Comments of NRTC, filed in response to 2001 Cable NOI. NRTC also addressed the accuracy of the Homes Passed statistic in its Comments filed in the Commission's Sixth Annual Cable Competition Report (See, Comments of the National Rural Telecommunications Cooperative, CS Docket No. 00-132, ¶¶8-15 (submitted September 8, 2000)).

³⁴ Memorandum Opinion and Order, *DIRECTV, Inc., et al. v. COMCAST Corporation, et al., Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, 22 CR 898, 2000 FCC LEXIS 6130, FCC 00-404, (Released November 20, 2000)..

³⁵ As the Commission has noted, the Program Access rules "have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors." Cable Act Report, at ¶21

19. This particular issue has been raised before the Commission on previous occasions by various parties. During the Commission's 2001 Cable Competition proceeding, several parties, including NRTC, voiced their support for extending the Program Access rules to include terrestrially delivered programming.³⁶ The Commission should act on these concerns and promote competition between DBS and cable.

III. CONCLUSION.

20. DBS has developed as a potent competitive force to cable, but the Program Access rules continue to be necessary to preserve and protect competition and diversity in the distribution of video programming. Allowing the Program Access rules to sunset at this point would thwart competition between DBS and cable and would disproportionately impact rural consumers across the country. For this reason, NRTC urges the Commission to extend the Program Access rules and to expand their scope to cover any terrestrially delivered programming that was previously delivered via satellite.

Respectfully Submitted,

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³⁶ See, Comments of Carolina Broadband, Inc., DIRECTV, Inc., EchoStar Satellite Corporation, RCN Corporation, The Satellite Broadcasting & Communications Association, and the Wireless Communications Association, filed in response to the 2001 Cable NOI.

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December 3, 2001

Certificate of Service

I HEREBY CERTIFY that on this 3rd day of December 2001, a true and correct copy of the foregoing **Comments of the National Rural Telecommunications Cooperative in the Implementation of the Cable Television Consumer Protection and Competition Act of 1992** was submitted electronically to the Federal Communications Commission and served via first-class mail upon the following:

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